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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM BEVAN AND WAVA BEVAN,
PETITIONERS,

v.

TOWNSHIP OF BRANDON, ET AL.,
RESPONDENT.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI FROM STATE OF MICHIGAN SUPREME COURT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

RESPONDENT, BRANDON TOWNSHIP, WILL ADDRESS THE QUESTIONS PRESENTED BY PETITIONERS WITHOUT MODIFICATIONS.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

The Township of Brandon, respectfully requests that this Court deny Petitioners' request to issue a Writ of Certiorari to review the Opinion of the Supreme Court of the State of Michigan in Bevan v Brandon Township, Docket No. 86358, decided September 9, 1991.

RESPONDENT'S STATEMENT OF THE CASE

A. Nature of the Case.

Defendant-Appellee acknowledges that Plaintiffs-Appellants' Statement of the case is consistent with the events below with certain significant exceptions.

At page 3 of their Petition, Plaintiffs-Appellants state that Mrs. Bevan purchased her two contiguous parcels at different times from different sellers. The existence of separate sellers has *never* before been indicated in the record of this case, and is contrary to the sixth paragraph of the stipulated facts (Petitioners' Appendix, p. 42a).

Also at page 3 of their Petition, Plaintiffs-Appellants state that Plaintiffs could construct a single family residence on each parcel. That is not consistent with the stipulated facts. The fourth paragraph of the stipulated facts (Petitioners' Appendix, p. 42a) is limited to the requirements of the *zoning ordinance*. Plaintiffs-Appellants did not present evidence that their parcels could comply with regulatory requirements outside the zoning ordinance.

In addition, Defendant-Appellee contests the statement (Petition, pp. 3 and 4) that each parcel was accessed by the easement and the easement was *used* by Plaintiffs' predecessor in title, and Plaintiffs. The stipulated facts state that the easement is unimproved (Petitioners' Appendix, p. 43a). There is no evidence of record as to what, if any, use has been made of the easement, and there is no record that the parcels were ever used separately.

Defendant-Appellee objects to Plaintiffs-Appellants' characterization, on page 4 of the Petition, of the Township Zoning Board of Appeals as *agreeing* with the Building Official that only one building permit would be allowed. The Zoning Board of Appeals was asked by Plaintiffs-Appellants to waive the width requirement for their private road to enable Plaintiffs-Appellants to request building permits for two sites. The waiver was denied by the Zoning Board of Appeals as an action within its sole

discretion. No proofs were presented that the Building Official was involved in the appeal process.

Plaintiffs-Appellants state incorrectly that the Court of Appeals ruled that the Township's ordinance precluded all reasonable use of their property. The Court of Appeals ruled that Plaintiffs' land consisted of two separate parcels and that Defendant-Appellee's private road ordinance had destroyed the value of one of those parcels. The Court of Appeal's ruling only applied to the parcel as artificially divided. The Michigan Supreme Court reversed, holding that Plaintiffs-Appellants' parcel could not be separated for takings analysis. Plaintiffs-Appellants retain full use of their residential parcel albeit limited in the number of possible building sites.

Finally, Defendant-Appellee notes that the opinion of the Michigan Supreme Court states that the Plaintiffs-Appellants' easement is only 290 feet long (Petitioners', Appendix p. 3a). This finding is not supported in the record, although Defendant-Appellee submits that such measurement would be relevant for public safety considerations.

B. Posture of the Case.

Defendant-Appellee disputes Plaintiffs-Appellants' presentation of the posture of the case and asserts that the decision of the Michigan Supreme Court is fully within the parameters of Federal Constitutional and Statutory law as interpreted by this Court.

REASONS FOR DENYING THE WRIT

In accordance with Rules 10.1(b) and (c) of the Rules of the Supreme Court of the United States, the Writ should be denied in this matter because the Michigan Supreme Court's decision is fully consistent with the prior decisions of this Court and there are no new issues to be settled.

Contrary to the representation by Plaintiffs-Appellants, this case differs from *Lucas v South Carolina Coastal Commission*, cert. filed September 13, 1991, U.S. Supreme Court Docket

No. 91-453. The regulation enforced by Brandon Township does *not* result in a total prohibition on the use of Plaintiffs-Appellants' property and the evidence submitted does not establish that *any* diminution in value occurred.

The *Lucas, supra* decision was rendered by a sharply divided South Carolina Supreme Court. The majority concluded that an otherwise valid government regulation designed to prevent serious public harm did not amount to a compensable taking even though the landowner could no longer use any of the subject property for its intended purpose. The *Lucas* Court relied heavily on *Keystone Coal Association v DeBenedictis*, 480 US 470, 107 S Ct 1232, 94 L Ed 2d 472 (1987); and *Mugler v Kansas*, 123 US 623, 8 S Ct 273, 31 L Ed 205 (1887). The dissent in *Lucas* also relied on *Keystone*, but argued that a conflict existed with the decision in *Pennsylvania Coal Co. v Mahon*, 260 US 393, 43 S Ct 158, 67 L Ed 322 (1922).

In the case at bar, the government regulation does *not* deny the landowners the ability to use their entire property for its intended purpose. This case is fully consistent with the principles recited in *Agins v City of Tiburon*, 447 US 255, 260, 100 S Ct 2138, 651 L Ed 2d 106 (1980), *Penn Central Transportation Co. v New York City*, 438 US 104, 98 S Ct 2646, 57 L Ed 2d 631 (1978), *Williamson County Regional Planning Commission v Hamilton Bank*, 473 US 172, 191, 105 S Ct 3108, 87 L Ed 2d 126, (1985), and *Keystone, supra*. Consequently, there has been no abuse of the requirements of the Fifth and Fourteenth Amendments of the United States Constitution, nor the privileges, rights and immunities recited in 42 USC 1983. This matter is not appropriate for review by this Honorable Court and the Petition for issuance of a writ should be denied.

ARGUMENT

I. WHETHER THE SUPREME COURT OF MICHIGAN IMPROPERLY INTERPRETED PLAINTIFFS' TAKING CLAIM UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN REVERSING THE MICHIGAN COURT OF APPEALS AND THE TRIAL COURT BELOW.

Plaintiffs-Appellants first argument involves their standing to pursue federal constitutional and statutory remedies for the alleged taking of their property. The issue of "ripeness" was raised in the case below, but Plaintiffs-Appellants' reference to "failure to exhaust administrative remedies" is a misleading oversimplification of the issue. Plaintiffs-Appellants failed to pursue judicial procedures for inverse condemnation and ignored a statutorily provided avenue of appeal from the decision of the Zoning Board of Appeals. They did not, therefore, meet the requirement of finality as set forth in *Williamson, supra*, 473 US at 186.

Although Petitioners have raised the finality question, the decision of the Michigan Supreme Court actually rested on the *absence* of a taking. The Court ruled as follows:

> Because the access regulation in question serves a legitimate governmental interest and does not deny the owners economically viable use of their land, we conclude that enforcement *does not effect an unconstitutional taking* of plaintiffs' property. (Petitioners' Appendix, p. 4a). (Emphasis added)

Consistent with the principle noted in *Agins, supra*, 447 US at 260, *Nollan v California Coastal Commission*, 483 US 825, 834-835, 107 S Ct 3141, 97 L Ed 2d 677 (1987) and *Penn Central, supra*, 438 US at 127, the Michigan Supreme Court went on to conclude that the Brandon Township Zoning Ordinance is a legitimate exercise of its police power (Petitioners' Appendix, p. 15a). Thereafter, the Court noted that Plaintiffs-Appellants had not shown a *diminution in value* sufficient to meet the standard of taking set forth in *Penn Central, supra* 438 US at

131 and the Michigan standard established in *Kropf v Sterling Heights*, 391 Mich 139, 215 NW 2d 179 (1974) (Petitioners' Appendix, p. 19a). Despite Plaintiffs-Appellants' protests, it cannot be disputed that their property remains as a valuable six acre building site (as opposed to the two smaller contiguous building sites).

The Michigan Supreme Court's decision rendered the issue of finality or ripeness moot. However, since Plaintiffs-Appellants have raised the question in their first argument, Defendant-Appellee will present its argument in opposition.

Plaintiffs-Appellants indicate the Michigan Supreme Court decision is violative of the Fifth and Fourteenth Amendments to the United States Constitution, but the thrust of their argument primarily concerns their statutory claim under 42 USC 1983. The rule for pursuing relief from a taking under 42 USC 1983 was set forth in this Court's decision in *Williamson, supra*, 473 US at 193. Clearly, before bringing a §1983 claim, a landowner must pursue administrative action to a finality to determine if an *actual concrete injury* has occurred. Plaintiffs-Appellants persisted in their applications for two building permits only until they had been denied on a request for a variance by the Brandon Township Zoning Board of Appeals. At that point, Plaintiffs-Appellants still had not reached a *final* decision.

Michigan law provides for direct access to a judicial review of the Zoning Board of Appeals action, not just for the purpose of determining whether the Zoning Board of Appeal's actions violated any of Plaintiffs-Appellants' rights, but a procedure for determining if the Zoning Board of Appeal's decision should be *final*. Section 23a of the Township Rural Zoning Act (MCL 125.293a, et. seq.; MSA 5.2963(23a)) provides:

> (1) The decision of the board of appeals rendered pursuant to section 23 shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal the circuit court shall review the

record and decision of the board of appeals to insure that the decision:

(a) Complies with the constitution and laws of the state.

(b) Is based upon proper procedure.

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

(2) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that there is additional evidence which is material and with good reason was not presented to the board of appeals, *the court shall order further proceedings before the board of appeals* on conditions which the court considers proper. *The board of appeals may modify its findings and decision* as a result of the new proceedings, or may affirm its original decision. The supplementary record and decision shall be filed with the court. (Emphasis added)

(3) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

By this procedure, the Circuit Court can review the propriety of the Zoning Board of Appeal's action and remand the matter if such action lacked proper basis. If the appeal procedure is used, it is possible under subparagraph (2) of Section 23a that the Zoning Board of Appeals could change its decision.

Plaintiffs-Appellants ignored this appellate procedure until 15 months after their appeal rights ended, arguably because it is judicial rather than administrative. But such an argument places form over substance. The appellate procedure under Section 23a is designed to augment the decision of the Zoning Board of Appeals and, as such, is a necessary step in arriving at a timely *final* decision. Truly efficient administration of justice is secured

by following the procedures designed for the early and direct resolution of disputes, not, as Plaintiffs-Appellants assert, by suing under various Federal and State theories long after their rights have become stale. Plaintiffs-Appellants have, in essence, attempted to leapfrog into Federal Constitutional relief without first honoring the appropriate State procedures.

Even if Plaintiffs-Appellants were not required to appeal under the terms of Section 23a, they failed to properly assert a judicial remedy that also is a precondition to their Federal claims.

In footnote 8 to its opinion (Petitioners' Appendix, p. 8a), the Michigan Supreme Court recognized that Plaintiffs-Appellants' 42 USC 1983 claim fell short of the requirements of finality because Plantiffs-Appellants did not seek compensation under State procedures for inverse condemnation. Although Plaintiffs-Appellants assert in their Petition that they did imply an inverse condemnation theory in their Complaint, they *did not pursue it* (Petition, p. 9). They offered no proofs of any diminution of the *value* of their property. Instead, they relied entirely on their theory that the loss of one possible building site constituted a total destruction of the value of all of their property rights. Although the Trial Court and Court of Appeals accepted this theory, the Michigan Supreme Court properly rejected it, and affirmed the principles of *Williamson, supra,* as followed in the Michigan case of *Electro-Tech v H.F. Campbell Co.,* 433 Mich 57, 429 NW2d 625 (1989) (Petitioners' Appendix, pp. 8a and 9a, Footnote 8).

Notwithstanding their failure to proceed timely and properly, Plaintiffs-Appellants insist that their Complaint was sufficient due to their claim of a taking under the Michigan Constitution of 1963, Art. X, Section 2, which impliedly is recognized as an inverse condemnation action. Having failed to offer proofs, Plaintiffs-Appellants attempt to create a case of inverse condemnation by stating (Petition, p. 9) that since the Trial Court found a taking *there must have been a taking.* The Michigan Supreme Court ruled that the Trial Court and the Court of Appeals were in error because they considered only the loss of the expectation of two building sites. Clearly, a taking means the loss of significant

value to the landowner, rather than just one aspect of potential future development.

In the closing paragraphs of Argument I, Plaintiffs-Appellants ask that this Honorable Court "finally rule in a definitive fashion that temporary damages for regulatory takings are available to Plaintiffs" (Petition, p. 10). Such a ruling has already been made in *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*, 482 US 304; 107 S Ct 2378 96 L Ed 2d 250; (1987). Plaintiffs-Appellants lost this case because the regulation applied to their land was determined to be a legitimate governmental action, with no evidence of destruction of Plaintiffs-Appellants' reasonable investment backed expectations. Keystone, supra. There are no compensable damages.

ARGUMENT

II. WHETHER THE LAND OWNER OF TWO SEPARATE CONTIGUOUS LOTS IS DENIED THE USE OF ONE OF THOSE, I.E., IS ONE TAKEN BY THE OPERATION OF DEFENDANT TOWNSHIP'S ZONING ORDINANCE AND PRIVATE ROAD ORDINANCE BY RESTRICTING THE USE OF ONLY ONE PARCEL AS A SINGLE FAMILY RESIDENTIAL SITE.

Plaintiffs-Appellants' statement of their second issue (recited above) presupposes the existance of a condition that legally doesn't exist — separate but contiguous parcels. Because of inadequate road access, Plaintiffs-Appellants' land is restricted to one six acre building site instead of their desired two smaller contiguous sites. Plaintiffs-Appellants throughout the history of this case have maintained that since their predecessor in title created two smaller acreage descriptions for this parcel that the land was somehow physically divided. As a result of this division, Plaintiffs-Appellants argue that Brandon Township's ordinance has destroyed one entire parcel. The facts of the case, as stipulated by the parties, do *not* support this theory. Moreover, the

Michigan Supreme Court concluded, on the basis of unanimous precedent, that the separation of parcels by nothing more than a tax description is insufficient to treat such parcels as independent entities for a taking analysis (Petitioners' Appendix, p. 13a).

Factually, Plaintiffs-Appellants are bound by the sixth and eleventh paragraphs of the stipulated facts (Petitioners' Appendix pp. 42a and 43a). The sixth paragraph notes that the parcel in question was six acres in size and Wava Bevan's predecessor in title had divided the parcel into two tax descriptions. Paragraph eleven informs us that the easement serving the parcel is unimproved and there has been no construction on the claimed building sites.

There is, therefore, no evidence, but for the fact that a tax description was placed on record prior to Plaintiffs-Appellants' purchase, that the land is divided in *any* way. Moreover, nothing was done by Plaintiffs-Appellants prior to the implementation of Defendant-Appellee's ordinance to indicate any use of the parcels as separate entities.[1] Plaintiffs-Appellants did not argue below that the Brandon Township ordinance was an invalid exercise of the Police Power (Petitioners' Appendix, p. 8a). This case is nothing more than a typical dispute between the requirement that government provide for the common good, and a landowner's desire to use his or her property to the greatest personal advantage. Since the government generally represents the interests of the public, the individual must accept some limitation to the unfettered use of his or her property. As Justice Holmes observed in *Pennsylvania Coal Co. v Mahon*, 260 US 393, 413, 43 S Ct 158, 67 L Ed 2d 322 (1922):

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[1] Plaintiffs-Appellants' Petition indicates for the first time that Mrs. Bevan acquired the property from separate sellers. Although this assertion is contrary to the record below, it has no bearing on the result. The Bevan's property was described out of a single parcel and remains in an unimproved condition under single ownership.

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law.

The Michigan Supreme Court, unlike the Trial Court and Court of Appeals before it, examined the totality of Plaintiffs-Appellants' property. Citing *Penn Central, supra,* 438 US at 130, the Court observed (Petitioners' Appendix p. 10a):

> . . . the Supreme Court has declined to view an owner's property as divisible for purposes of a "taking" analysis.

Thereafter, the Court quoted directly:

> The submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable . . . *'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.* In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the *parcel as a whole* . . . " 438 US 130-131 (Emphasis supplied)

Plaintiffs-Appellants attempt to distinguish *Penn Central, supra* by arguing that the issue therein involved only one parcel of property. However, the pertinent issue in *Penn Central* is the landowner's desire, based on mere expectation, to further develop its property, without regard to the legitimate interest of the public. Likewise, Plaintiffs-Appellants belief that they would someday build two houses on their property does not entitle them to compensation when the legitimate public interest requires that they only build one house.

The Plaintiffs-Appellants still have their six acre residential parcel, and they made no showing that such a site had no economic viability for residential purposes. This is not a situation

where the government actually intruded on the land and left a permanently altered condition as in *Nollan, supra.*

Actually, if Plaintiffs-Appellants' taking theory is accepted, they could be in a position to receive a windfall. If Brandon Township is forced to compensate the Plaintiffs-Appellants for the total loss of one building site, the Plaintiffs-Appellants could later sell the full six acre parcel and again realize the incremental added value of the *taken* small parcel within the resulting large parcel. No theory of "just compensation" could contemplate that a landowner receive *more* than the value of his or her land at the expense of the public.

Plaintiffs-Appellants also attempt to distinguish this case from the fact situation in *Agins, supra.* Again, Plaintiffs-Appellants rely on their tax descriptions and claim they owned multiple parcels while *Agins* purportedly dealt with a single parcel (Petition, p. 14). Surprisingly, Plaintiffs-Appellants appear to be presenting Defendant-Appellee's case when they note that the *Agins* parcel was five acres (Bevans have six acres); the Plaintiffs in *Agins* could still utilize their whole parcel as zoned (Bevans have lost *no* land and the entire six acres remains zoned for residential purposes); the only question in *Agins* was the number or density of single family homes to be placed on the parcel (precisely the dispute for the Bevans).

Finally, Plaintiffs-Appellants claim that although the landowners in *Penn Central* and *Agins* were unsuccessful, the Bevans should prevail because they *asked* for two building permits eight years after the zoning ordinance was implemented. To suggest that a simple request for building permits, without any other action on the land, somehow vests property rights in the landowner is directly contrary to Michigan law. As noted in the Michigan Supreme Court's Opinion (Petitioners' Appendix, pp. 16a and 17a):

> In order for a nonconforming use of land to vest, actual construction on the site must have begun before the zoning regulation is adopted. Application of a zoning ordinance does

not amount to a taking where the nonconforming use of the property rests solely within the owner's contemplation (citing *Gackler v Yankee Springs Township*, 427 Mich 562, 573-574; 398 NW2d 393 (1986)). Also *Franchise Realty Interstate Corp. v Detroit*, 368 Mich 276; 118 NW2d 258 (1962).

Plaintiffs-Appellants further argue under *Keystone, supra*, that the limiting of their property from two building sites to one building site destroyed their reasonable investment backed expectations (Petition, p. 13). In making this argument, Plaintiffs-Appellants disregard the fact that pursuant to this Court's ruling, neither of the landowners in *Agins* nor *Penn Central* were able to develop their property in accordance with their expectations. Plaintiffs-Appellants overlook this Court's clear mandate in *Keystone, supra* that the Court must evaluate the impact of the regulation on the *value* of the property as a whole. 480 US at 494.

In their Petition, Plaintiffs-Appellants assert that a standard for compensable takings exists when the landowner's interest is affected by more than 2% (Petition, p. 15). Furthermore, Plaintiffs-Appellants believe *Nollan, supra* is relevant to this issue because the taking therein involved a relatively small easement of only 10 feet in width. Plaintiffs-Appellants' purpose is seemingly to establish a quantitative takings standard. However, Plaintiffs-Appellants again ignore the fact that *Nollan* involved an actual *intrusion* onto the landowner's property. Plaintiffs-Appellants have not experienced an intrusion and, contrary to their protests, they have not suffered a 50% nor a 100% loss of their property (Petition, p. 15). Plaintiffs-Appellants forget that where there is no physical occupation, a regulatory taking analysis must concentrate on *value*, not the thing itself. Plaintiffs-Appellants still own a six acre parcel of residential land, nothing less. Moreover, this question has already been addressed by this Court and, even if there is a diminution of value, the established rule remains that a set percentage analysis is not appropriate. *Penn Central, supra*, 438 US at 104.

The "one owner, one parcel" concept is not new to Michigan law. When unplatted adjoining parcels are joined under *one*

ownership they create an "assemblage" or unity of ownership resulting in one continuous area or acreage of land. Such assemblage is thereafter considered a single parcel. The Michigan Attorney General has also interpreted the Michigan Subdivision Control Act, MCLA 560.01, et. seq., MSA 26.430(101), et. seq., specifically as to unplatted contiguous parcels. The Subdivision Control Act of 1967 defines "parcel" or "tract" as:

> A *continuous* area or acreage of land which can be described as provided for in this act. (Emphasis added)

At question 7 of the Attorney General's Opinion (OAG, 77-78, No. 5361, p. 610 (September 12, 1978)) is the following:

> When a proprietor by deed or deeds acquires title to adjacent unplatted parcels of land, he has created an assemblage, i.e. he has united in one uniform ownership a "contiguous area or acreage of land". The resulting unplatted assemblage of land must thereafter be considered as a single parcel for purposes of ascertaining whether any subsequent division or partition is an act of "subdivision".

Footnoted to the above was the following with citations to *State Highway Commissioner v Englebrecht,* 2 Mich App 572; 140 NW2d 760 (1966) and *State Highway Commissioner v Snell,* 8 Mich App 299; 154 NW2d 631 (1967):

> A parcel or tract of land made up of more than one lot that are (sic) contiguous having a uniformity of ownership and use is considered as a single parcel for the purpose of determining diminution of its value when only a portion of the parcel or tract is acquired by eminent domain proceedings. These lots are not to be considered as separate and independent parcels merely because they were purchased at different times and are separated by an imaginary line.

In our case, we have two parcels with an "imaginary line" between. Plaintiffs are aggrieved because they cannot build two houses, one on either side of the imaginary line, instead of one

house on the one contiguous six acre parcel that they themselves created.

The Michigan Supreme Court, although it did not cite the Subdivision Control Act in this case merely affirmed what was already established in Michigan. The cases referenced above succinctly state that the Act's definition of a "parcel" for "takings" analysis is applicable.

Additional, long established, Michigan law does not support Plaintiffs-Appellants' case. The Michigan Supreme Court cited *Kropf, supra,* 391 Mich at 163 (Petitioners' Appendix, p. 18a):

> An aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.

Because Plaintiffs-Appellants chose to rely exclusively on the tax descriptions for their property, they failed to produce any evidence as to its value as regulated. Accordingly, the Michigan Supreme Court ruled that Plaintiffs-Appellants had failed to meet the necessary State standard. (Petitioners' Appendix, p. 19a).

The application of both State and Federal law by the Michigan Supreme Court in this case has been consistent with established precedent. Such precedent is clear and unambiguous on the question of the identity of property rights, to-wit: takings analysis requires evaluation of the landowner's property as a whole, not in individual segments and not based on various expectations. *No valid purpose* will be served by granting Plaintiffs-Appellants' petition to merely affirm that which is already the established law.

III. WHETHER THE MICHIGAN SUPREME COURT IMPROPERLY INTERPRETED AND APPLIED THE BRANDON TOWNSHIP PRIVATE ROAD ORDINANCE TO THE FACTS OF THIS CASE IN LIGHT OF ESTABLISHED FEDERAL TAKING JURISPRUDENCE.

In their third issue, Plaintiffs-Appellants, as they did in the lower Courts, overlook the fact that they offered absolutely no evidence to prove that the Brandon Township Private Road Ordinance was not a proper legislative enactment. Plaintiffs-Appellants maintain that simply because they don't believe that the ordinance is appropriate in their situation, further evidence is unnecessary (Petition, p. 15).

It is not the duty of Brandon Township to prove that its legislative pronouncements are valid. It is the duty of the complaining landowner to prove that they are *not* valid. *Kropf, supra,* 391 Mich at 163.

The Michigan Supreme Court examined the preamble to the Brandon Township ordinance and distinguished a valid governmental purpose (Petitioners' Appendix, p. 14a, full text at p. 50a).

> It is recognized that such standards are necessary because of the need for road services adequate to provide year around access by fire, police, and like emergency vehicles. It is further recognized that if roads are not constructed in accordance with certain minimum standards, such roads frequently become impassable . . . and otherwise pose a threat to the health, safety and welfare of the residents located along the roadway, as well as those other residents who would find use of the roadway essential. Ordinance No. 42.

Unlike the Trial Court and the Court of Appeals, the Michigan Supreme Court recognized that public interest becomes involved when more than one *family* must rely on the road without regard to the usage by the public in general. The Court stated (Petitioners' Appendix, p. 15a):

> The Township legislatively determined that the public interest requires a wider access where it must serve, and be maintained by, two or more *residences* and is no longer under the sole control of one landowner. (Emphasis added)

The Michigan Supreme Court went on to note that the Court of Appeals erred when it substituted its "two residences" standard for the legislative standard set in the ordinance (Petitioners' Appendix, p. 16a)[2]. Thereafter by way of a footnote, the Court observed:

> In a related argument, plaintiffs contend that the ordinance is unreasonable because it defines a private road as one "open to the public" and the use of plaintiffs' easement by the public will be minimal. However, we note that *the operative language of the ordinance is whether access is provided to more than one residence,* and the ordinance specifically states that a private road may be restricted in its use to residents only. (Emphasis added) (Petitioners' Appendix, p. 16a, Footnote 15).

Quite simply, by raising this issue, Plaintiffs-Appellants are trying, as they did below, to have this Court substitute its opinion for the factual determinations made by the legislative body for Brandon Township. In the absence of a finding that such legislative enactment is constitutionally infirm the granting of their request would go against separation of powers principles that have been in effect for 200 years. Defendant-Appellee respectfully prays that this Honorable Court decline such an opportunity.

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[2] Defendant-Appellee asserts that it is inappropriate to encourage judicial interference with proper legislative function. The Court of Appeals conducted *no* independent inquiry into the reasoning behind the roadway standard and simply chose a different number to effectuate its opinion.

CONCLUSION

Plaintiffs-Appellants have failed to present any compelling reason why their Petition should be granted. The decision of the Michigan Supreme Court is based on its determination of the true nature of Plaintiffs-Appellants' property. As such, the decision is well reasoned and consistent with the precedents established by this Court. Unlike other matters pending before this Court, upon which Plaintiffs-Appellants rely, there is no conflict within this case as to the nature or applicability of the Federal law. Defendant-Appellee respectfully requests that the Petition be denied.

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